No. 90-544

In The

Supreme Court of the United States

October Term, 1990

THE LOUISIANA PATIENT'S COMPENSATION FUND,

Petitioner,

versus

WALLY EUGENE STUKA AND LORNA MARIE STUKA

Respondents.

RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

1. Does the settlement provisions of the *Louisiana Malpractice Act* afford procedural and substantive due process where it mandates that prior to a settlement the Insurance Commissioner, as custodian of the funds held as the Patient's Compensation Fund, be given notice and cited to appear at hearing to approve or disapprove a settlement?

2. Was the Commissioner of Insurance, as custodian of the funds of the Patient's Compensation Fund, afforded due process where he was given notice of and cited to appear at a hearing to approve or disapprove a proposed settlement, and he failed to appear?

3. Can a party invoke this Court's jurisdiction by raising a constitutional due process issue on a petition for rehearing before a State Supreme Court where the constitutionality of a statute was not plead and tried at the trial level, as required by the State's law and procedure?

LIST OF PARTIES

The parties are:

Wally Eugene Stuka

Lorna Marie Larrieu Stuka

Dr. Michael O. Fleming

Dr. Marion Cash

Dr. Ricky L. Jones

Michael O. Fleming and Ricky L. Jones (A Medical Corporation)

St. Paul Fire and Marine Insurance Company

The Louisiana Patient's Compensation Fund

State of Louisiana

Honorable Doug Green, Commissioner of Insurance, State of Louisiana

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JURISDICTION

The "Patient's Compensation Fund" is not a juridical person under Louisiana law as enunciated in the *Louisiana Civil Code, Article 24,* which declares:

> There are two kinds of persons: natural persons and juridical persons.
>
> A natural person is a human being. A juridical person is an entity to which the law attributes personality, such as a corporation or partnership. The personality of a juridical person is distinct from that of its members.

The "Patient's Compensation Fund" was not named as a party. The Commissioner of Insurance as the administrator of the patient's compensation fund was named as a party. For brevity the patient's compensation fund is used to denote the Commissioner of Insurance As Administrator of the Patient's Compensation Fund, but the patient's compensation fund is not a juridical person and cannot stand or be cast in Judgment. *Felix v. St. Paul Fire and Marine Insurance Co.,* 477 So. 2d 676 (1985).

The Petitioner did not timely plead the unconstitutionality of *LSA-R.S. 40:1299.41* through *40:1299.48,* particularly *R.S. 40:1299.41(c)(5).* The Commissioner of Insurance, as the statutory custodian of the funds held in a special budget account identified as the patient's compensation fund account, was timely cited to appear at the hearing to approve or disapprove the proposed settlement of Respondents with the Health Care Providers, as provided by the *Act.* No appearance was made. Subsequent to the duly scheduled hearing the Commissioner of

Insurance filed an "answer" but did not plead the unconstitutionality of the *Malpractice Act* as Louisiana procedural law requires. The constitutional issue could and should have been raised at that time. *State v. Great Atlantic & Pacific Tea Co.*, 190 La. 925, 183 So. 219 (1938), cert. denied 59 S.Ct. 108, 305 US 637, 83 L. Ed. 410; *Johnson v. Welsh*, 334 So.2d 395 (La. 1976).

STATUTES INVOLVED

Louisiana Revised Statutes 40:1299.41 through *40:1299.48*, specifically the settlement provisions found at *40:1299.44(c)(5)*, are the statutes involved herein.

STATEMENT OF THE CASE

The Respondents instituted a claim for medical negligence against three Doctors, who were all qualified Health Care Providers under Louisiana's *Medical Malpractice Act*. Discovery disclosed that only one was negligent. The Respondents and the negligent Doctor and his insurer desired to settle and invoked the settlement provisions of Louisiana's *Medical Malpractice Act, LSA-R.S. 40:1299.41* through *40:1299.48*.

In compliance with the *Act* Respondents sent a detailed 45 paragraph petition to the Commissioner of Insurance. The Commissioner failed to respond. The Respondents then, as required by the *Act*, caused a citation to issue giving 20 days to file responsive pleadings,

either approving or disapproving the proposed settlement. The Commissioner failed to answer the petition. The Respondents then obtained from the Trial Judge a hearing date which was duly noticed to the Commissioner. The Commissioner failed to appear at the hearing. Evidence was adduced at the hearing in support of approval of the settlement. The Trial Judge approved the settlement. The Respondents' medical bills alone exceeded the $100,000 maximum amount which the health care provider was obligated to pay under the *Act*.

The Respondents, in their original pleading invoking a Medical Review Panel, challenged the constitutionality of this limitation. The Louisiana Supreme Court has not passed upon the constitutionality of this provision, but has held the $400,000 fund arrangement established by the *Act* to be constitutional. *Williams v. Kushner*, 524 So.2d 191, [La. App., 4 Cir. (1988).], 524 So.2d 191, writ granted 526 So.2d 785, 549 So.2d 294 (La. App., 1989). This constitutional issue is now moot since the Respondents have settled with and granted a restricted release to the health care provider, reserving their rights against the Commissioner of Insurance for the Court to set the amount to be paid from the patient's compensation fund.

The day after the Trial Judge had rendered his Judgment approving the settlement the Commissioner of Insurance filed an eight paragraph "answer," which did not address the substantive issues of the Respondents' petition, but objected to the admission of liability provision of this *Act* as being applicable to the Court-approved settlement. Under Louisiana law the Petitioner was required to plead unconstitutionality of the *Act* at that time but did not do so.

The Respondents moved to strike those portions of the Commissioner's answer which denied the admission of liability and the request for a jury trial. The Respondents' Motion to Strike was sustained. The Petitioner obtained writs to the intermediate Second Circuit, Court of Appeal, which reversed the Trial Court. The Respondents perfected writs to the Louisiana Supreme Court which remanded the case for briefing and argument before the Court of Appeal. The Court of Appeal affirmed its previous ruling. The Respondents perfected writs to the Louisiana Supreme Court. The case was briefed and argued before the Louisiana Supreme Court. The Louisiana Supreme Court reversed the Court of Appeal, except as to the granting of a jury trial to the Petitioner. The Petitioner applied for a rehearing and for the first time made the constitutional attack on the *Act*. The Louisiana Supreme Court denied the rehearing. The Petitioner as the "Patient's Compensation Fund" timely filed writs with this Honorable Court. Neither the Commissioner of Insurance nor the State of Louisiana sought writs.

REASONS FOR NOT GRANTING THE WRIT

I. THE "PATIENT'S COMPENSATION FUND" IS NOT A JURIDICAL PERSON AND NOT A PARTY TO THE LAWSUIT.

The Patient's Compensation Fund is not a juridical person. *Louisiana Civil Code, Article 24*. It is characterized by the statute as a "budget unit of this state." *LSA-R.S. 40:1299.44(A)(5)(g)*. The Commissioner of Insurance has the responsibility to collect the monies derived from the surcharge on qualified health care providers and to

administer the Fund. The Commissioner of Insurance is designated in the statue as the party responsible for the Fund and upon whom all citations must be served. *LSA-R.S. 40:1299.44C.* The funds that the Commissioner collects are paid into the State Treasury and held in trust for the benefit of malpractice claimants and health care providers. Upon proper submission of a final judgment or agreed-upon settlement, the Commissioner files a request with the State Treasury who issues a warrant against the Fund in the amount of the Judgment or settlement. *LSA-R.S. 40:1299.44(B)(1) and (2); Felix v. St. Paul Fire and Marine Insurance Co.*, 477 So.2d 676 (1985).

The "Patient's Compensation Fund" is not a juridical person under Louisiana law as enunciated in the *Louisiana Civil Code, Article 24,* that declares:

> There are two kinds of persons: natural persons and juridical persons.
>
> A nature person is a human being. A juridical person is an entity to which the law attributes personality, such as a corporation or partnership. The personality of a juridical person is distinct from that of its members.

According to civilian doctrine, juridical persons are classified either as private persons or public persons. A public person is governed by rules of public law; a private person is governed by rules of private law. The state and its political subdivisions have dual personality. At times they act as public persons in a sovereign capacity and at times as private persons in the capacity of a citizen or a private corporation. The property that the state and its political subdivisions own is known as "public property." This property consists of two categories of things:

public things, namely, things that the state and its political subdivisions own in their capacity as public persons; and private things, namely, things that the state and its political subdivisions own in their capacity as private persons.

The personality of a juridical person is distinct and distinguishable from that of its members. The patrimony of a juridical person is distinct and distinguishable from the patrimony of its members. The capacity of a juridical person is governed by provisions in its charter, governing legislation and customs. *Louisiana Civil Code, Article 24.*

The "Patient's Compensation Fund" was not named as a party. The Commissioner of Insurance as the administrator of the patient's compensation fund was named as a party. For brevity the patient's compensation fund is used to denote the Commissioner of Insurance As Administrator of the Patient's Compensation Fund, but the patient's compensation fund is not a juridical person and cannot stand or be cast in Judgment. *Felix v. St. Paul Fire and Marine Insurance Co.*, 477 So. 2d 676 (1985).

The Patient's Compensation Fund has no standing to sue or be sued. *Felix v. St. Paul Fire and Marine Insurance Co.*, 477 So.2d 676 (1985). It is nothing more than a file name given to a dedicated account under the administration of the Commissioner of Insurance.

The Louisiana *Medical Malpractice Act* may well be unconstitutional, but not in the context urged by the Petitioner. The Louisiana Supreme Court has not passed on the threshold issue of the constitutionality of *LSA-R.S. 40:1299.42A(2),* which provides that a qualified health care provider shall not be liable for an amount in excess

of $100,000 for all claims of malpractice because of injury or death to any one person. The Louisiana Supreme Court in *Williams v. Kushner*, 524 So.2d 191 [La. App., 4 Cir., (1988)], 524 So.2d 191, writ granted 526 So.2d 785, 549 So.2d 294 (La. App., 1989) did not pass on that issue because the claimant and the health care provider had settled and the claimant was seeking only an amount from the Patient's Compensation Fund.

That is the identical situation in the Respondents' case. The Respondents initially urged in the Medical Review Panel proceedings that the *Act* was unconstitutional in limiting the amount of Respondents' recovery, however, when Respondents settled with the health care provider and executed a restricted release the constitutionality issue became moot as Respondents' only remaining claim is what amount, if any, is due from the fund administered by the Commissioner of Insurance.

II. PETITIONER HAD OPPORTUNITY TO AND WAS OBLIGED UNDER LOUISIANA LAW TO PLEAD THE UNCONSTITUTIONALITY OF THE MALPRACTICE ACT AT THE TRIAL LEVEL.

The Plaintiff did not timely plead the unconstitutionality of the *Malpractice Act*. Petitioner raised for the first time in its Motion For Rehearing before the Louisiana Supreme Court the constitutionality attack upon the *Act*. Louisiana law requires that an attack upon the constitutionality of an *Act* must be plead and tried at the trial level. *State v. Great Atlantic & Pacific Tea Co.*, 190 La. 925, 183 So. 219 (1938), cert. denied 59 S. Ct. 108, 305 US 637, 83 L. Ed. 410; *Johnson v. Welsh*, 334 So.2d 395 (La. 1976).

III. LOUISIANA'S MEDICAL MALPRACTICE ACT AFFORDS DUE PROCESS IN LSA-R.S. 40:1299.44C.

Louisiana's *Medical Malpractice Act* provides that when a health care provider and a claimant desire to settle and the claimant is demanding money from the Patient's Compensation Fund for a complete and final release, they must follow the procedure set forth in *LSA-R.S. 40:1299.44C*. This procedure requires that a copy of the petition to settle be sent to the Commissioner of Insurance at least ten days before filing and shall contain sufficient information about the nature of the claim and the additional amount demanded. The Commissioner may agree to the settlement or he may file written objections to the amount demanded. The agreement or objection to the payment demanded shall be filed within 20 days after the petition is filed. The Court shall then fix a day for hearing on the proposed settlement and all parties, including the Commissioner, are notified to be present. At the hearing all parties may introduce evidence to enable the Court to determine whether or not to approve the proposed settlement.

The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be held after fair and timely notice and an adequate opportunity to be heard and present evidence. *Armstrong v. Manyo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 65 (1965); *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970).

The Louisiana *Malpractice Act* which conforms to the fundamental due process requirements. The Commissioner of Insurance received Respondents' petition to

settle on August 1, 1988. The Commissioner was then served with another copy and cited to answer the petition with his approval or objection on August 19, 1988. The Commissioner was then served with notice on September 1, 1988, that a hearing was to be held on Respondents' petition to settle on September 14, 1988. The Commissioner failed to file an answer as required by the statute and failed to appear at the hearing. The Commissioner has the right to intervene and assert claims of negligence against any Health Care Provider he deems culpable. If the Commissioner thought the proposed settlement was inappropriate, he could have filed an objection to the settlement.

To grant the Petitioner's requested relief would operate as an impediment to settlement of any future malpractice claims. They would all have to be tried adding additional burdens to an overcrowded Court system. Both the Health Care Provider and the Claimant have an interest in maintaining the integrity of the settlement provisions of the *Act*.

IV. CONFLICTS AMONG CIRCUITS AS TO WHETHER POLITICAL SUBDIVISION MAY CHALLENGE THE VALIDITY OF A STATE STATUTE.

The cases cited have no relevance to the issue posed by the Petitioner. The patient's compensation fund is nothing more than a file name given to a dedicated account under the control of the Commissioner of Insurance. The patient's compensation fund is not of the same legal substance as the political entities who acquired property and challenged the deprivation of this property

under due process grounds. Whether a political subdivision can challenge its creator is a flimsy vehicle in which to bring this constitutionality issue of this case before the Court.

The case, as presented, has no universal application, but is parochial to the unique settlement provisions of the Louisiana malpractice statute.

CONCLUSION

The Petitioner's petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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Petition to Impanel Medical Review Panel And For Damages ..... App. 1

PETITION TO IMPANEL MEDICAL REVIEW PANEL AND FOR DAMAGES

TO: COMMISSIONER OF INSURANCE, STATE OF LOUISIANA, The Hon. Sherman Bernard

This is the petition of WALLY EUGENE STUKA and LORNA MARIE LARRIEU STUKA, husband and wife, residents of and domiciled in the State of Louisiana at 9470 Poinsetta Drive, Shreveport, LA 71118, who, with respect represent:

1.

Initially, the Petitioners contend that *La.R.S. 40:1299.41, et seq,* and the provisions therein are unconstitutional and null and void; nevertheless, unable to contend same are unconstitutional in a Court of proper jurisdiction until a Petition to Impanel a Medical Review Panel And For Damages is filed with the Commissioner of Insurance in accordance with the said Statute and availing themselves of the provisions thereof, reserving all rights of unconstitutionality therein to be urged at a latter date, this claim for impanelling of the Medical Review Panel And For Damages is hereby filed.

2.

The Petitioners are:

(1) WALLY EUGENE STUKA, husband of LORNA MARIE LARRIEU STUKA, a person of the full age of majority, and a resident of and domiciled in the Parish of Caddo, State of Louisiana, residing at 9470 Poinsetta Drive, Shreveport, LA 71118.

(2) LORNA MARIE LARRIEU STUKA, wife of WALLY EUGENE STUKA, a person of the full age of majority, and a resident of and domiciled in the Parish of Caddo, State of Louisiana, residing at 9470 Poinsetta Drive, Shreveport, LA 71118.

3.

The persons who should be given notice of this claim are:

(1) DR. MICHAEL FLEMING, 2205 East 70th Street, Shreveport, LA 71105;

(2) DR. MARION CASH, 2205 East 70th Street, Shreveport, LA 71105;

(3) DR. RICKY JONES, 2205 East 70th Street, Shreveport, LA 71105;

4.

That WALLY EUGENE STUKA and LORNA MARIE LARRIEU STUKA were married on July 13, 1985, and of their union one (1) children [sic] was born; namely, WALLY ANTHONY STUKA on March 30, 1986.

5.

That LORNA MARIE LARRIEU STUKA was under the care of the Defendant-Doctors for many years prior to the incident arising herein. LORNA MARIE LARRIEU STUKA was under the care of DR. MICHAEL FLEMING and went to see him on September 6, 1985 for sinus

problems. He made a physical examination and prescribed medication.

6.

Petitioner, LORNA MARIE LARRIEU STUKA, saw DR. MICHAEL FLEMING again on November 15, 1985, and she again complained of headaches and sinus problems; DR. MICHAEL FLEMING examined her and prescribed medication.

7.

Petitioner, LORNA MARIE LARRIEU STUKA, had been seeing a Dr. Daigle, who had confirmed on August 21, 1985, that she was pregnant, and she continued to see Dr. Daigle and saw him on September 14 and on October 23, 1985, at which time a sonogram was performed by Dr. Daigle. Since she was seeing DR. MICHAEL FLEMING for her sinus problems, she decided to let DR. MICHAEL FLEMING handle the pregnancy and to deliver her baby. She saw DR. MICHAEL FLEMING on November 26, 1985, for her first OB Visit with him. An examination was performed, but no tests were given and Petitioner was informed by DR. MICHAEL FLEMING that he would send and get her chart from Dr. Daigle. It was on this date that she made her first $100.00 payment on her pregnancy.

8.

Petitioner, LORNA MARIE LARRIEU STUKA, saw DR. MICHAEL FLEMING on December 18, 1985, for an

OB Visit and check-up and she made another $100.00 payment on this visit. She told DR. MICHAEL FLEMING that she was continuing to have headaches.

9.

On January 17, 1986, she saw DR. MICHAEL FLEMING and paid him $200.00 and he did a check-up on her. She told him that the headaches were continuing and they were getting more severe. At that time he did a neurological examination by turning the lights out and having her look at a small light across the room. She informed him that she was continuing to have nausea. DR. MICHAEL FLEMING informed her that the nausea was related to her pregnancy. He prescribed Tylenol Extra Strength and told Petitioner to take it every four (4) hours.

10.

Petitioner, LORNA MARIE LARRIEU STUKA, saw DR. MICHAEL FLEMING on February 12, 1986, and paid him $150.00 for the OB Visit and check-up. She told him she was continuing to have headaches and they were growing increasingly worse and asked him if he was sure they were caused by the pregnancy. DR. MICHAEL FLEMING told her to use hot compresses and she would probably have the headaches for the duration of the pregnancy. He again examined her eyes and nose at that time.

11.

On February 24, 1986, the Petitioner again saw DR. MICHAEL FLEMING and at this time she came in specifically about the headaches she was having. They were severe and she was now having watering from her eye. No tests were performed on this occasion and DR. MICHAEL FLEMING told Petitioner it was still migrain [sic] headaches related to her pregnancy. He informed her that he as [sic] going to be out of town and he would refer her to DR. MARION CASH and DR. RICKY JONES.

12.

On March 3, 1986, Petitioner went in to see DR. MICHAEL FLEMING, but was referred to DR. MARION CASH. She paid $25.00. She informed DR. MARION CASH that she had been seeing DR. MICHAEL FLEMING and the headaches were getting progressively worse and at that time they were very severe and she was having a hard time going to work. She questioned whether the headaches were really related to her pregnancy and thought it might be something else. He agreed with her and said it might be so and prescribed Kelflex for her to take.

13.

On March 13, 1986, Petitioner went in for a regular OB Visit and on that occasion saw DR. RICKY JONES and paid $50.00. She told DR. RICKY JONES that the headaches were very bad and the medication was not helping and that she was throwing-up several times a day. DR.

RICKY JONES told her to keep taking the Tylenol and, if she just could not bear it, to come in for a pain shot.

14.

On March 18, 1986, Petitioner's headaches were extremely severe and she was throwing-up constantly; Petitioner's her [sic] Father came to pick her up and take her to see DR. RICKY JONES. As DR. RICKY JONES was coming into the room, the Petitioner threw-up; DR. RICKY JONES told her that she must be having cluster headaches and changed her medication to Demerol and gave her a shot telling her that it would break the pain chain.

15.

On March 19, 1986, when the Petitioner's husband, WALLY EUGENE STUKA, came home from work to check on her and perhaps take her to the doctor, he found her to still be in bed and worse. Her husband called at 4:30 o'clock P.M. and was told by the Nurse that DR. MARION CASH and DR. RICKY JONES had already gone for the day. The Petitioners left their home telephone number; as Petitioner, WALLY EUGENE STUKA, was leaving the home number and telling the Nurse how bad LORNA MARIE LARRIEU STUKA'S headaches were, DR. MARION CASH, who was supposedly not there, got on the telepone [sic]. Petitioner, WALLY EUGENE STUKA, again explained the symptoms that LORNA MARIE LARRIEU STUKA had been having and the terrible headaches. Petitioner, LORNA MARIE LARRIEU STUKA, was very weak and she could not keep anything

on her stomach – not even water. Now she was so weak she could not even get out of bed. The Petitioner's husband wanted to take her to Schumpert Medical Center, but was informed by DR. MARION CASH that it would only cost her money and that anything they could do for her at Schumpert Medical Center could be done for her in his office at much less cost. He told Petitioner's husband that he would phone in a prescription for some suppositories and he should try to get liquids down Petitioner, LORNA MARIE LARRIEU STUKA.

16.

The medication in the nature of suppositories was obtained and they did help in allowing Petitioner to keep some fluids down, but the next day on March 20, 1986, Petitioner continued to have pain and was getting progressively weaker. When the Doctor was called for an appointment, the Nurse informed Petitioner to come in, "in the morning." Petitioner was up all that night. The next morning, on March 21, 1986, the Petitioner's Father came to take her to the Doctor; the Petitioner was having difficulty staying awake. The Petitioner was taken to the Schumpert Medical Center and admitted at 1:23 o'clock P.M. and was diagnosed as having, "brain abscess in the right frontal lobe." Surgery was performed for "drainage and excision of the right frontal lobe abscess, emergency right frontal craniotomy." She was found to have infection in her right sinus.

17.

Petitioner, LORNA MARIE LARRIEU STUKA, was admitted by DR. MARION CASH, whose impression on admission was:

(1) Recurrent sinusitis associated with nausea, vomiting and dehydration.

(2) Pre-eclampsia.

(3) Central nervous system lesion.

18.

At this time, Petitioner was thirty-six (36) weeks gestation.

19.

A Gynecologist was called in for consultation and after examination ruled out the pre-eclampsia; and, a Neurosurgeon was called in for consultation the following day on March 22, 1986, whose impression was as follows:

(1) Acute right frontal cerebritis with early formation of an abscess.

(2) Postictal, secondary to generalized seizure.

(3) Increased intracranial pressure, secondary to the acute cerebritis.

20.

The right front temporal craniotomy was performed on March 22, 1986, and revealed a right frontal lobe abscess with rupture and adherence to surrounding fibers and osseous structures. The abscess capsule was removed; the frontal sinus communicated with cranial cavity and the posterior wall of the right frontal sinus

was grossly necrotic. The right frontal sinus was debrided.

21.

The Petitioner, LORNA MARIE LARRIEU STUKA, underwent aspiration and irrigation of the right maxillary sinus on subsequent days. She also underwent an emergency Cesarean Section on March 30, 1986.

22.

The Petitioner, LORNA MARIE LARRIEU STUKA, now suffers some permanent seizure disorders and other related brain damages.

23.

DRS. MICHAEL FLEMING, MARION CASH and RICKY JONES, in evaluating Petitioner's headaches neglected to take any x-rays or run any tests whatsoever and Petitioners show such x-rays and tests would have more probably than not provided the diagnosis that Petitioner, LORNA MARIE LARRIEU STUKA, had frontal and ethmoidal sinusitis and right frontal lobe brain abscess.

24.

Petitioners respectfully show that the failure of DRS. MICHAEL FLEMING, MARION CASH and RICKY JONES to do the following resulted in treatment and care

below the standard of care for the specialty of family medicine practice:

(1) To have x-rays and tests made.

(2) To do a CT scan to evaluate headaches which continued to be progressively worse.

(3) They were negligent in failing to timely respond to LORNA MARIE LARRIEU STUKA'S condition and give immediate attention to the diagnosis and treatment of her condition, i.e. headaches and sinusitis which ultimately resulted in LORNA MARIE LARRIEU STUKA having a brain abscess.

(4) They were negligent in failing to exercise the degree of skill and care ordinarily exercised by other physicians engaged in the practice of the medical speciality [sic] of a family medicine practitioner.

Each of these deletions in treatment represented in and of themselves sub-standard care that falls below the standard of care for a family medicine practitioner.

25.

Petitioners respectfully show that the principles of res ipsa loquitur are applicable to the present situation as an alternative pleading in that:

(1) The accident or injury that LORNA MARIE LARRIEU STUKA underwent normally does not occur in the absence of negligence;

(2) There exist an absence of direct evidence to explain the activities leading up to her injuries, damages and surgery;

(3) The accident, injuries, damages and surgery resulting from the administration of the treatment was caused by an agency or instrumentality within the actual or constructive control of the Defendants.

26.

And, further Petitioners show, pleading as an alternative measure to res ipsa loquitur, that on information and belief the named Defendants have never experienced such injuries and damages as experienced by the Plaintiff from treatment such as was rendered LORNA MARIE LARRIEU STUKA.

27.

Petitioners, LORNA MARIE LARRIEU STUKA and WALLY EUGENE STUKA, respectively, ask for such damages as are reasonable in the premises for the injuries and damages they have suffered, including loss of consortium and the medical and hospital bills incurred.

28.

Petitioner, LORNA MARIE LARRIEU STUKA, shows she has been damaged in the nature of pain and suffering, disability, inconvenience, mental anguish, ridicule and embarrassment, loss of support and wage-earn ability, having a condition that makes her susceptible to seizures, having a condition that requires her to take medication daily for the rest of her life, brain damage and all related conditions and dysfunctions. Petitioner further shows that the medication she is required to take causes

birth defects and she is, therefore, unable to have any more children.

29.

That Petitioners, LORNA MARIE LARRIEU STUKA and WALLY EUGENE STUKA, desire that a Medical Review Panel be envoked [sic] according to law that the treatment LORNA MARIE LARRIEU STUKA received at the hands of the Defendants, DRS. Dr. [sic] MICHAEL FLEMING, MARION CASH and RICKY JONES be reviewed by this Panel according to law and an appropriate report made.

WHEREFORE, PETITIONERS PRAY:

THAT a Panel be envoked [sic] and a termination made forthwith pursuant to *La.R.S. 40:1299.47*.

/s/ Don Miller
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ATTORNEY FOR PETITIONERS,
LORNA MARIE LARRIEU
STUKA and
WALLY EUGENE STUKA

STATE OF LOUISIANA

PARISH OF CADDO

BEFORE ME, undersigned Notary, personally came and appeared LORNA MARIE LARRIEU STUKA and WALLY EUGENE STUKA, who, after being duly sworn, did state:

That they are the Petitioners in the above and foregoing PETITION TO IMPANEL MEDICAL REVIEW PANEL AND FOR DAMAGES; that all of the allegations and statements contained therein are true and correct to the best of their knowledge, information and belief.

/s/ Lorna Marie Larrieu Stuka
LORNA MARIE LARRIEU STUKA,
Petitioner.

/s/ Wally Eugene Stuka
WALLY EUGENE STUKA,
Petitioner.

SWORN TO AND SUBSCRIBED before me this the 19 day of February 1987.

/s/ Trudy M. Daniel
NOTARY PUBLIC

STATE OF LOUISIANA

PARISH OF CADDO

DONALD R. MILLER, being first duly sworn did depose and say that he is of counsel in the foregoing response of the Respondents and that all of the allegations of fact therein contained are true and correct to the best of his knowledge, information and belief.

Affiant further states that a copy of the foregoing response has been duly mailed in properly addressed envelopes, postage prepaid, to:

(1) Hon. Frans J. Labranche, Jr.
Clerk, Louisiana
Supreme Court
Supreme Court building
301 Loyola Avenue
New Orleans, LA 70112

for filing in 89-CC-1391

(2) Hon. Diana Pratt Heisler
Clerk, Second Circuit,
Court of Appeal
430 Fannin Street
Shreveport, LA 71101

for filing in #20600-CW

(3) Hon. Curtis Warren
Clerk, First Judicial
District Court
Caddo Parish Courthouse
501 Texas Avenue
Shreveport, LA 71101

for filing in #330,930

(4) Jerald L. Perlman
Walker, Tooke, Perlman, Lyons & Greer
Attorneys at Law
1700 Irving Place
Shreveport, LA 71101

SHREVEPORT, LOUISIANA, this 18 day of OCTOBER, 1990.

/s/ Don Miller
DONALD R. MILLER,
ATTORNEY
FOR RESPONDENTS

SWORN TO AND SUBSCRIBED before me on this the 18 day of OCTOBER, 1990, at Shreveport, Caddo Parish, Louisiana.

/s/ Trudy M. Daniel
NOTARY PUBLIC.